



# Litigation Update

Litigation Section News

June 2005

## **Counsel must get ruling on objections or waive them on appeal.**

Recent cases have made it clear that, unless counsel obtains a trial court ruling on an objection, the issue is waived on appeal. (See e.g., *Saelzler v. Advanced Group400* (2001) 25 Cal.4th 763, 767–768, [23 P.3d 1143, 107 Cal.Rptr.2d 617].) The rule was reiterated in *Gallant v. City of Carson* (Cal. App. Second Dist., Div. 1; April 20, 2005) 128 Cal.App.4th 705, [2005 DJDAR 4481]. But what is counsel to do if the court refuses to rule on the objection? In a dissenting opinion in *Gallant*, Justice Miriam Vogel argues that the rule should only be applied in connection with motions for summary judgment or adjudication because the statute specifically so provides.

Justice Vogel notes, “lawyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek. Judges know they are supposed to rule on evidentiary objections and those who fail to do so may frown upon the lawyer who presumes to tell the court how to do its job.”

We doubt that case law requires the kind of harangue Justice Vogel seeks to avoid. But it clearly is not sufficient merely to file evidentiary objections in law and motion matters. Counsel should clearly, unequivocally, and on the record, firmly request that the court rule on the objections.

If the court refuses, counsel should cite authority for the proposition that it is the court’s duty to do so. If such a record is made, we doubt that the appellate court will find a waiver. A petition for extraordinary writ seeking to compel the court to rule on the objections would also be appropriate.

## **Scope of foundation required for expert opinion is under review by Supreme Court.**

In our March newsletter, we cited *Lockheed Litigation Cases* (Cal. App. Second Dist., Div. 3; January 31, 2005) 126 Cal.App.4th 271, [23 Cal.Rptr.3d 762, 2005 DJDAR 1293] for a detailed discussion of the complex issues that arise under *Evid. Code* § 801 (b) which spells out the foundational facts on which an expert opinion must rest. The California Supreme Court has now granted review (April 13, 2005; Case No. S132167) [2005 DJDAR 4267], so the case may no longer be cited.

## **Contesting merits of CCP § 473 motion does not waive time limit.**

A motion for relief from a judgment, dismissal, or other proceeding must be filed within six months. (*Civ. Proc.* § 473 (b).) When such a motion is filed beyond the six-month deadline, does the opposing party waive the timeliness issue by contesting the motion on the merits? In *Arambula v. Union Carbide Corp.* (Cal. App. Second Dist., Div. 3; April 8, 2005) 128 Cal.App.4th 333, [2005 DJDAR 4127], the appellate court answered the question in the negative. But to be on the safe side, we suggest that, when faced with this situation you contest the motion both on the merits and on the timeliness issue.

**Plaintiff is not entitled to discover insurer’s financial condition.** Although a party may generally only obtain discovery relating

to matters that may lead to the disclosure of relevant evidence that is admissible at trial or facts that may lead to such evidence, *California Code of Civil Procedure* § 2017 (b) contains an exception to this in that it permits discovery of insurance coverage available to a party, even though this would not be admissible at trial. The purpose of this exception is that such knowledge will aid settlement of cases. But the exception extends only to information about policy limits, not about the financial strength of the insurer. *Catholic Mutual Relief Society v. Superior Court* (Cal. App. Second Dist., Div. 8; April 25, 2005) [2005 DJDAR 4688].

## **Pending legislation may impose sales tax on legal fees.**

Larry Doyle, legislative representative of the State Bar, reports that AB 9 introduced in mid-April by California Assembly Member Joseph Coto (D-San Jose) would impose a state sales tax on legal services. Information on AB 9 can be found at: [www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_9&sess=CUR&house=B&author=coto](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_9&sess=CUR&house=B&author=coto). So far the bill has been sidelined in the Assembly Revenue and Taxation Committee but Doyle reports that is quite possible that the proposal will reemerge as part of other legislation during budget negotiations. The State Bar’s Board of Governors is opposing the bill.

## **Supreme Court will decide whether Proposition 64 applies to pending cases.**

In our March and April newsletters we reported on several cases dealing with the applicability of Proposition 64 to cases that were pending when the amendments went into effect. Courts of Appeal are split on the issue. As expected, the California Supreme Court has granted review in these cases. They may, therefore, no longer be cited. It may well be another

### **Create Your Member Profile On-line**

Watch for your access code in your mail, or obtain it from your State Bar dues statement. Then go on-line to create your profile and customize your interests. [www.calbar.org](http://www.calbar.org)

year or so before we will know the answer to these questions raised by the passage of Proposition 64.

The lead case is *Californians For Disability Rights v. Mervyn's LLC* (Cal. Sup. Ct. Case No. S131798) prior history, (Cal. App. First Dist., February 1, 2005) 126 Cal.App.4th 386, [24 Cal.Rptr.3d 301], briefing in the other cases was deferred until that case is decided. Except that in *Branick v. Downey Savings & Loan* (Cal. Sup. Ct. Case No. S132433) prior history, (Cal. App. Second Dist., Div. 5; February 9, 2005) 126 Cal.App.4th 828, [24 Cal.Rptr.3d 406], the court ordered briefing limited to the issue whether new plaintiffs may be substituted if the present plaintiff is disqualified under Proposition 64.

**Contractual attorney fee clause may not be limited to particular type of claim.** *Civil Code* § 1717 provides that if a contractual provision awards fees to one party, the fee clause is applied in favor of either party.

### Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with.

Go to:

<http://members.calbar.ca.gov/mb/howForum.aspx?ForumID=13> to explore the new bulletin board feature—just another benefit of Litigation Section membership.

**Remember to first fill out the Member Profile to get to the Discussion Board!**

The party preparing the contract cannot contravene the requirements of the statute by limiting the attorney fee clause to a particular type of claim. In *Kangarlou v. Progressive Title Company, Inc.* (Cal. App. Second Dist., Div. 4; April 28, 2005) [2005 DJDAR 4976], a contract prepared by an escrow company provided that it was entitled to fees "in the event of failure to pay fees or expenses" owed to the escrow company. The buyer sued the escrow company and prevailed on a theory that the escrow company had violated *Bus. & Prof. Code* § 1037 by transacting business through unlicensed persons. The Court of Appeal ruled that, although the suit had nothing to do with a "failure to pay fees or expenses," buyer was nevertheless entitled to attorney fees under *Civ. Code* § 1717. *See also, Paul v. Schoelkopf* (Cal. App. Second Dist., Div. 4; April 5, 2005) 128 Cal.App.4th 147, [26 Cal.Rptr.3d 766, 2005 DJDAR 4010].

**Party may contradict deposition admissions in opposition to summary judgment motion by competent evidence other than the deposed party's declaration.** In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, [112 Cal.Rptr. 786, 520 P.2d 10], the California Supreme Court held that admissions of a party contained in a deposition are binding on the party in a summary judgment proceeding, absent a credible explanation. Party-deponents cannot successfully resist a summary judgment motion based on such admissions by merely filing their own self-serving declarations impeaching their own deposition testimony. But this does not mean that other evidence filed in opposition to the summary judgment motion may be ignored.

In *Scalf v. D. B. Log Homes, Inc.* (Cal. App. Third Dist.; May 5, 2005) [2005 DJDAR 5107] plaintiff admitted in his deposition that he did not observe any defects in defendant's product and defendant received summary judgment on the basis of these admissions. The Court of Appeal reversed, holding that the trial court erred in relying on *D'Amico* in refusing to consider other evidence that contradicted plaintiff's own testimony. The court noted that admissions in a deposition are

not judicial admissions as are responses to requests for admission. They are merely evidentiary admissions that may be contradicted and, if so, a triable issue of fact is raised precluding summary judgment.

### Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

#### Executive Committee

William J. Caldarelli, *Chair*  
Richard L. Seabolt,  
*Vice-Chair*  
Mark A. Mellor, *Secretary*  
Erik J. Olson, *Treasurer*  
Laurie Barber  
Craig S. Barnes  
Elizabeth A. England  
Stacy B. Eurie  
Lawrence C. Hinkle, II  
Hon. James P. Kleinberg  
Joel W. H. Kleinberg  
David Eric Kleinfeld  
Gregory A. Nysten  
Kathleen D. Patterson  
Paul A. Renne  
Herbert W. Yanowitz  
Paul Michael Zieff

#### Advisors

Charles V. Berwanger  
Richard Best  
Laura Lee Blake  
Hon. Lawrence W. Crispo  
Dana J. Dunwoody  
Michael S. Fields  
Hon. J. Richard Haden  
Hon. Anthony W. Ishii  
Hon. Martin J. Jenkins  
George L. Mallory, Jr.  
Curtis D. Parvin  
Hon. Ronald S. Prager  
Rhonda Reid  
Hon. William F. Rylaarsdam  
Jerome Sapiro, Jr.  
E. Bob Wallach  
Hon. James L. Warren

#### Section Administrator

Tom Pye (415) 538-2042  
[Thomas.pye@calbar.ca.gov](mailto:Thomas.pye@calbar.ca.gov)

#### Senior Editor

Honorable William F. Rylaarsdam  
Supervising Editor for Weil & Brown,  
*California Practice Guide, Civil Procedure Before Trial*,  
by The Rutter Group.

#### Managing Editor

Mark A. Mellor, Esq.